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Supreme Court, U.S.
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OFFICE OF THE CLERK

2006-3287

IN THE

Supreme Court of the United States

HARRY M. SCHMITT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent

and

DEPARTMENT OF THE NAVY,

Intervenor.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Harry M. Schmitt
7211 Captain Kidd Avenue
Sarasota, FL 34231-4718
(941) 923-2253

Introductory Statement

The Navy assigned the petitioner his supervisor's, Mr. Lloyd P. Diehl's, old E-mail code. The petitioner detected pornography being sent to his supervisor from his business associates including Lockheed Martin. The petitioner turned in his supervisor's pornography to the Navy's onsite Ethics officer, Ms. Ann B. Jones, as directed by the Navy's offsite Ethics Officer, Ms. Elizabeth Fischmann. The Navy told the on and off-site military, civil servants and contractors that I was the one that turned in my supervisor's pornography. Thus, the Navy created a sexually harassing, hostile threatening reprisal for whistleblowing environment against the petitioner.

The Navy took advantage of the petitioner's concurrent family hardship case by having the petitioner disbarred from his workplace when the petitioner's brother called in a false alarm threat to the petitioner's supervisor. Previously, the petitioner had repeatedly warned his supervisor and the Navy chain of command that his brother was going to call in a false alarm threat in the petitioner's name because the petitioner and his sister were going to have the petitioner's brother removed from guardian of their demented mother because of petitioner's brother's chronic alcoholism and unacceptable physical attacks upon petitioner's person.

Questions Presented for Review

1. Have you ever had another case in this court? No In a United States district court? No In the Equal Employment Opportunity Commission? Yes If so identify each case.

   EEOC Case Number 150-2003-09475X - Sex, Male

EEOC Case Number 150-2003-09476X - Reprisal, Disability - Mental Stress

2. Did the MSPB or arbitrator incorrectly decide or fail to take into account any facts? Yes If so, what facts?

Navy attorney, Ms. Louise Vitale, SPLe-12, coerced Ms. Milagros Vazquez, Deputy Equal Employment Opportunity Officer, Code 734, Orlando, FL, into providing false sworn statement to Equal Employment Opportunity Commission, Officer of Federal Operations' Director. The Secretary of the Navy threw out the Navy's coerced EEOC settlement agreement. Naval Ordinance Test Unit's Ethics Officer, Ms. Ann B. Jones, stated to me, in person three times, that the NOTU command was going to fire her for my turning in my supervisor's, Mr. Lloyd P. Diehl's, pornography into her. My supervisor told NOTU co-workers and contractors, via E-Mail, that I turned in his pornography into the NOTU command. I was being sexual harassed and threaten by my supervisor, co-workers and contractors for turning in my supervisor's pornography into Ms. Ann B. Jones, NOTU's Ethics Officer. The NOTU command was threatening to fire me if I complained to NOTU's Inspector General, Captain Thomas about the hostile threatening workplace environment. I was being harassed and threaten by the Cape Canaveral Air Force Base security police for cooperating with NOTU's second inspector General, Captain Angelika Evangelist, USNR, Orlando, FL.

3. Did the MSPB or arbitrator apply the wrong law? Yes If so, what law should be applied?

Sexual Harassment, hostile threatening workplace environment, law should be applied in my MSPB

appeals case instead of reprisal for whistleblower law cited in the MSPB's initial decision and affirmed in the MSPB's Final Order.

4. Did the MSPB or arbitrator fail to consider important grounds for relief? Yes If so, what grounds?

The employing agency denied my reasonable accommodation request for lateral transfer to another federal agency.

5. Are there other reasons why the MSPB's or arbitrator's decision was wrong? Yes If so, what reasons?

The NOTU command committed a willful medical Privacy Act violation against me by sending my medical records to the Naval Criminal Investigative Service, NCIS, without my written permission or knowledge. The NOTU command committed a willful Unfair Labor Practice against me by revoking my security clearance with the DON CAF for cooperating with NOTU's second Inspector General, Captain Angelika Evangelist, after I had already fully cooperated with NOTU's first Inspector General, Captain Thomas. These willful violations of law perpetrated against me by the employing agency have been reported to the Department of Defense Inspector General, as well as, to the Defense Criminal Investigative Service, DCIS, FBI and to the United States Attorney General.

6. What action do you want the court to take in this case?

Job restoration in equivalent federal job position, attorney fees, back pay and related benefits, medical

costs, travel expenses, reasonable and foreseeable monetary damages caused by the employing agency's prohibited practices, monetary payments for personal and emotional pain and suffering injuries, consequential and actual damages incurred in my medical Privacy Act violation by the employing agency.

7. Do you want to argue before the court in person? Yes If yes, what are the reasons why argument will aid the court?

Argument will aid the court in understanding the reasons behind how the employing agency perpetrated its acts of fraud and abuse of authority upon me, an innocent victim of sexual harassment in the employing agency's hostile threatening workplace environment.

8. Do you intend to represent yourself? No If you have not filed an Entry of Appearance, indicate your full names, address, and telephone number.

Harry Michael Schmitt
7211 Captain Kidd Avenue
Sarasota, Florida 34231-4718
(941) 923-2253

Basis for Jurisdiction in the Supreme Court

The United States Court of Appeals for the Federal Circuit entered judgement on December 6, 2006 contained in the appendix, Volume I. The statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review a writ of certiorari the judgement in question is 5 U.S.C. Section 2302(b)(8), commonly called reprisal for

whistleblowing, victim of prohibited personnel practice, indefinite suspension.

Statement of the Case

The petitioner's individual right of action under statutory provision 5 U.S.C. Sections 1214(a)(3) and 1221 was denied by the respondent for personnel action taken against petitioner because of petitioner's protected disclosure, indefinite suspension, and denial of the petitioner's reasonable accommodation request, transfer to another federal agency, by the respondent contained in appendix, Volume II.

Statement of the Facts

The Secretary of the Navy, the Honorable Gordon R. England, threw out the Navy's coerced EEOC settlement agreement with the petitioner PA-83 and (PA)177-179. The petitioner was disbarred from the workplace, Naval Ordinance Test Unit (NOTU), by LCDR Mark L. Stevens PA-225 and placed on an indefinite suspension effective on August 13, 2002 by CDR Howard P. Miller (PA) 226-238.

The petitioner exhausted all procedures regarding petitioner's whistleblower complaint with the Office of Special Counsel (OSC). The petitioner attached the OSC dismissal to MSPB letter dated September 29, 2005 to petitioner's Individual Right of Action (IRA) package to the MSPB's Atlanta Regional Office PA-197 and PA-247.

The petitioner disclosed to NOTU's Ethics Officer, Ms. Ann B. Jones, that the petitioner was receiving pornographic E-Mails addressed to his Supervisor on his NOTU assigned E-Mail code (PA)33-35 and (PA)48-58. The employing agency, NOTU, coerced the petitioner into a constructive discharge.

The petitioner informed the MSPB Administrative Judge, Anthony W. Cummings, prior to November 23, 2005, about the employing agency's witness affidavits, via telephone conversation; however, the administrative judge rejected the employing agency's witness affidavits stating that the petitioner's designated legal representative needed to submit the employing agency's witness affidavits.

The petitioner asked his designated legal representative, via FAX, to please file the employing agency's witness affidavits, evidence and argument before the MSPB administrative judge's February 3, 2006 filing deadline because the petitioner was suffering from chronic lower back pain that left the petitioner partially paralyzed at that time resulting in physician ordered physical therapy and complete bed rest PA-27. The petitioner's designated legal staff informed the petitioner, via telephone conversation, on February 7, 2006, that my designated legal representative could not file the Appeal, and that the petitioner needed to file the appeal. Therefore, the petitioner asks the court to set aside the untimeliness issue in this appeal case. Furthermore, the subject of the allegations in the petitioner's complaint is a combination of reprisal for whistle blowing and other prohibited personnel practices (PA) 201-202.

The petitioner's basis for reasonable accommodation is post traumatic stress disorder that the employing agency's working conditions, sexual harassment, sexual intimidation and retaliation, were exacerbating my health because of my supervisor, Mr. Lloyd P. Diehl (PA)10-16, (PA)34-35, PA-42 and PA-71.

The petitioner's basis for violation of the Privacy Act is Ms. Ann B. Jones, NOTU's Ethics Officer, statement to the Department of the Navy's Central Adjudication Facility (DON CAF) investigator that she came to me asking about Dr. Cathy P. Milam and that the petitioner became upset over

her inquiry. Ms. Ann B. Jones statement to the DON CAF investigator is false (PA) 1-8, (PA) 17-26, (PA) 38-42 and (PA) 46-292.

Presidential and Congressional Inquiries

The petitioner's Presidential and Congressional inquiries sent to the Department of Defense and the Department of the Navy, appendix, Volume II.

Argument for Allowance of the Writ

The petitioner's reasonable accommodation request, transfer to another federal agency, was denied by the respondent supporting the petitioner's contention of the petitioner's hostile threatening, sexual harassing, workplace environment under statutory provision 5 U.S.C. Sections 2302(b)(1), (b)(9) and (b)(10) and the unwarranted invasion of the petitioner's personal privacy under statutory provision 5 U.S.C. Section 552(b)(7)(C) and 552a(g)(1)(C), constitutional civil rights violation.

Basis for Jurisdiction in the Supreme Court

Statutory Provision believed to confer on the Supreme Court Jurisdiction to review a Petition of a Writ of Certiorari the judgement in question:

> Statutory Provision 5 U.S.C. Sections 2302(b)(8), Reprisal for Whistleblowing and Victim of prohibited personnel practices, 2302(a)(2), adverse actions, indefinite suspension and psychiatric testing and examination and unfair labor practices under 5 U.S.C. Sections 7116(a)(1) and (4).

Argument

Statutory Provision 5 U.S.C. Sections 1214(a)(3) and 1221, individual right of action denied by MSPB for personnel action taken against petitioner, indefinite suspension, because of protected disclosure and agency failed to reasonably accommodate petitioner's disability, transfer to another federal agency, supporting the petitioner's contention of hostile threatening workplace environment, under Statutory Provisions 5 U.S.C. Section 2302(b)(1), (b)(9) and (b)(10), Sexual Harassment, Cooperation with OSC and Non-job related conduct, and 5 U.S.C. Sections 552(b)(6) and (b)(7)(C) and 552a(g)(1)(C), Unwarranted Invasion of Personal Privacy, constitutional civil rights violation, contained in appendix, Volume II.

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

06-3287

HARRY M. SCHMITT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF THE NAVY,

Intervenor.

DECIDED: December 6, 2006

Before MAYER, RADER, and GAJARSA, Circuit Judges.

RADER, Circuit Judge.

The Merit Systems Protection Board (Board) dismissed Harry M. Schmitt's Individual Right of Action

(IRA) appeal because he did not allege that his protected disclosure was a contributing factor in any adverse agency action. Schmitt v. Department of Navy, No. AT-1221-05-0958-W-1 (MSPB December 30, 2005). Finding no reversible error, this court affirms

On December 12, 2005, Mr. Schmitt resigned from his position as a GS-12 Electronics Engineer at the Naval Ordinance Test Unit (NOTU). His resignation was part of a settlement agreement for Equal Employment Opportunity (EEO) complaints filed in February and July 2002. By the express language of the settlement agreement, Mr. Schmitt released the Navy "from any and all liability from all claims alleged in, arising out of, or related to the above captioned case(s) (the EEO complaints) and all matters of dissatisfaction regarding his employment with the agency, through the date of this agreement." Further, Mr. Schmitt agreed that all "claims/complaints at any stage of processing are hereby withdrawn and complainant's right to file complaints for any matter through the date of the agreement is waived."

Despite having waived all claims through December 12, 2003, Mr. Schmitt complained to the Office of Special Counsel (OSC). On September 12, 2005, the OSC sent Mr. Schmitt a letter reminding him of the terms of the settlement. This letter further noted that the new complaint did not assert any new issue within the Board's jurisdiction. Absent a new issue, the OSC did not plan further action on the complaint. Before closing the file, however, OSC provided Mr. Schmitt sixteen days to supplement the record.

Instead of supplementing the record to the OSC, on September 15, 2005, Mr. Schmitt filed an Individual Right of

Action (IRA) under the Whistleblower Protection Act (WPA) alleging the Navy had taken an undetermined personnel action against him in reprisal for whistleblowing activities. Mr. Schmitt attached the OSC's September 12, 2005 letter to his IRA. On November 23, 2005, the Board issued an Order warning Mr. Schmitt that the OSC had not yet terminated its investigation and that Mr. Schmitt had not identified a personnel action allegedly taken against him by the Navy. The Order further required Mr. Schmitt to submit within seven days evidence that he had exhausted his remedies before the OSC and had made a non-frivolous allegation of whistleblowing activity.

Mr. Schmitt did not respond to the November 23, 2005 Order on time. On December 12, 2005, December 20, 2005, and December 22, 2005, Mr. Schmitt submitted documents related to his earlier EEO complaints. On December 30, 2005, the Board dismissed Mr. Schmitt's appeal for lack of jurisdiction.

II

Whether the Board has jurisdiction to adjudicate a particular appeal is a question of law, which this court reviews de novo. Herman v. Department of Justice, 193 F 3d 1375, 1378 (Fed Cir. 1999); Mr. Schmitt has the burden of establishing jurisdiction before the Board by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2) (2006); Clark v. United States Postal Service, 989 F. 2d 1164, 1167 (Fed. Cir. 1993).

The Board may grant a petition for review based on new and material evidence that, despite due diligence, was not available when the record closed. 5 C.F.R. §

1201.115(D)(1). However, the Board only has jurisdiction over an IRA appeal if the appellant has exhausted all administrative remedies before the OSC and made "non-frivolous allegations" that: (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(B)(8), and (2) the disclosure was a contributing factor in the Agency'S decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(A) Yunus v. Department of Veterans Affairs, 242 F. 3d 1367, 1371 (Fed. Cir. 2001). Under the WPA, protected disclosures include "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (I) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8).

Mr. Schmitt did not timely respond to the Board's November 23, 2005 Order. Further, even had Mr. Schmitt's submissions been timely, the Board found Mr. Schmitt's submissions did not establish a non-frivolous allegation of protected disclosures that were a contributing factor in an agency action against him. Indeed, because Mr. Schmitt's submissions relate entirely to his earlier EEO complaints, their use has been waived.

Lastly, in his appeal to this court, Mr. Schmitt for the first time asserts sexual harassment and hostile workplace allegations. As these issues were never considered by the Board, they are not properly before this court.

For the foregoing reasons, this court affirms the decision of the Board to dismiss Mr. Schmitt's appeal for lack of jurisdiction.

United States Court of Appeals for the Federal Circuit

06-3287

HARRY M. SCHMITT,

Petitioner,

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF THE NAVY,

Intervenor.

JUDGMENT

On APPEAL from the Merit Systems Protection Board in Case NO(S): AT1221050958-W-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED_____ "s/Jan Horbaly"
Jan Horbaly, Clerk

ISSUED AS A MANDATE: JAN 29, 2007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

HARRY M. SCHMITT, Appellant,	DOCKET NUMBER AT-1221-05-0958-W-1
v.	
DEPARTMENT OF THE NAVY, Agency.	DATE: December 30, 2005

Archibald J. Thomas, III, Jacksonville, Florida, for the appellant

Kevin J. Keefe, Esquire, Washington, D.C., for the agency.

BEFORE
Anthony W. Cummings
Administrative Judge

INITIAL DECISION

On September 15, 2005, Harry M. Schmitt filed an individual right of action (IRA) appeal with the Board's Atlanta Regional Office in which he alleged that the Department of the Navy took an undetermined personnel action against him in reprisal for his protected whistleblowing activities,

Based on the following analysis and findings, the appeal is DISMISSED for lack of jurisdiction.[1]

ANALYSIS AND FINDINGS

Background

The undisputed evidence of record indicates that, via a letter dated September 12, 2005, the Office of Special Counsel (OSC) responded to the appellant's complaint against the managers of his former employers, the Naval Ordinance Test Unit at Cape Canaveral, Florida. *See* Appeal File, Tab 1. In that letter, OSC informed the appellant that it was not clear from the information the appellant provided "what in your situation presents a new issue that is within our jurisdiction." Id. Moreover, OSC wrote that the appellant did not describer "What appears to be a prohibited personnel practice that is different from issues you have raised with the OSC previously which we have reviewed." *Id.* Finally, OSC informed the appellant that it intended on closing its inquiry into his complaint, but before actually doing so it would give the appellant an opportunity to supplement the record with a response addressing each of the reasons it stated in its preliminary determination to close the case. *Id.* It gave the appellant 16 days from the date of its September 12, 2005 letter to supplement the record with the requested information. *Id.* The appellant did not respond to OSC's request. Rather, the appellant filed the instant appeal to the Board.

---

[1]The appellant requested a hearing. I find that no hearing is necessary, however, because the appellant failed to raise allegations of fact which, if proven, could establish the Board's jurisdiction over his appeal. *See Dick v. Department of Veterans Affairs, 290 F. 3d 1356, 1361-62 (Fed. Cir. 2002); Pickens v. Social Security Administration, 88 M.S.P.R. 525, 531 (2001).*

In its response to the appellant's appeal to the Board, the agency acknowledges its ignorance of the action which the appellant alleges the agency took in reprisal for his whistleblowing activity. Instead, the agency avers that "the appellant resigned from his agency employment in accordance with a settlement agreement reached in the matter of two Equal Employment Opportunity (EEO) complaints...and it appears that what he (the appellant) alleges to be 'whistleblowing' was the subject matter of his EEO complaints." Agency File, Tab 1.

Jurisdiction

The Whistleblower Protection Act (WPA) provides that an individual who believes he was subjected to a personnel action[2] because he made protected whistleblowing disclosures may file an IRA appeal with the Board. *See* 5 U.S.C. § 122(a); 5 C.F.R. §1209.2 (2004). Before filing an IRA appeal with the Board, however, the individual must first seek corrective action from OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(1) (2004). To satisfy the exhaustion requirement, an appellant must inform OSC of the precise grounds of his charge of whistleblowing, giving

[2] The statute defines "personnel action" as an appointment; a promotion; an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; a detail, transfer; or reassignment; a reinstatement; a restoration; a re-employment; a performance evaluation under 5 U.S.C. chapter 43; a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in 5 U.S.C. § 2302(a)(2)(A); a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions. 5U.S.C. §2302(a)(2)(A); a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions. 5 U.S.C.§ 2302(a)(2)(A).

OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board,* 981 F.2d 521, 526 (Fed. Cir. 1992); *Reschlag v. Department of the Army,* 89 M.S.P.R. 589, 638 (2001), *review dismissed,* 32 Fed. Appx. 543 (Fed. Cir. 2002). The Board may only review those disclosures and personnel actions that an appellant raised before OSC. *Ellison v. Merit Systems Protection Board, 7 F.3d 1031 (Fed. Cir. 1993); Lewis v. Department of the Army, 58 M.S.P.R. 325,332 (1993).*

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); and (2) the disclosure was a contributing factor in the agency's decision to take or to fail to take a personnel action. *See Yunus v. Department of Veterans Affairs, 242 F. 3d 1367 (Fed. Cir. 2001); Rusin v. Department of the Treasury,* 92 M.S.P.R. 298, 304 (2002).[3] In order to establish jurisdiction over an IRA appeal, an appellant is not required to prove that he made protected disclosures, merely to make a nonfrivolous allegation that his disclosures were protected. *Rusin,* 92 M.S.P.R. 298, ¶¶ 10-11. Protected whistleblowing takes place where an appellant made disclosures that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *Stauner v. Department of the Interior, 86M.S.P.R. 179, ¶ 4 (2000).*

[3] A nonfrivolous allegation is an allegation of fact that, if proven, could establish a prima facie case that an appellant made a whistleblowing disclosure. Ferdon v. U.S. Postal Service, 60 M.S.P.R. 325, 329 (1994).

By Order dated November 23, 2005, the appellant was apprised of the jurisdictional issue this case presents. Appeal File, Tab 4. Specifically, the appellant was informed that he had to file a statement of factual evidence, i.e., he had to assert nonfrivolous allegations of jurisdiction supported by affidavits or other evidence, responding to the requirements noted above. *Id.* He was informed that the written record would determine whether his allegations were non-frivolous. *Id.* He was also informed that if he made nonfrivolous allegations of fact to establish jurisdiction, he would be entitled to a hearing on the merits of his claim, and if he did not his appeal would be dismissed based on lack of Board jurisdiction. Id. The appellant did not provide a timely response to that Order.

I find the appellant has failed to establish Board jurisdiction over this IRA claim. In an IRA appeal, the standard for establishing subject matter jurisdiction and the right to a hearing is assertion of a nonfrivolous claim. See Langer v. Department of the Treasury, 265 F.3d 1259, 1265 (Fed. Cir. 2001). Here, the appellant was placed on notice by the Board's November 23, 2005 Jurisdiction Order of what he had to show or allege to establish IRA jurisdiction, and was ordered to make a nonfrivolous allegation to establish such jurisdiction. Appeal File, Tab 4. He failed to make a nonfrivolous allegation that a protected disclosure he made was a contributing factor to an agency decision to threaten, propose, take, or fail to take a personnel action.

The appellant failed to make the required showing necessary to establish Board IRA jurisdiction over his appeal, and the record otherwise fails to support a finding of Board

jurisdiction on some other basis. Consequently, this appeal must be dismissed for lack of Board jurisdiction.[4]

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/Anthony W. Cummings
Anthony W. Cummings
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **February 3, 2006,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision.

[4] To the extent that the appellant's claims of whistleblowing mirror the subject matter of his prior EEO complaints, such claims fail to establish jurisdiction as the filing of an EEO complaint does not constitute whistleblowing activity protected under 5 U.S.C. § 2302(b)(8). It is well-settled that "[w]hen disclosures that would otherwise be protected under [5 U.S.C. § 2302(b)(8)] are made solely in the course of exercising agency grievance rights or the agency's discrimination complaint process, and never presented outside of that context, only [5 U.S.C. § 2302(b)(9)] is implicated, and an IRA appeal will be dismissed for lack of jurisdiction." *See Serrao v. Merit Systems Protection Board, 95 F.3d 1569, 1575 (Fed.Cir. 1996); Thomas v. Department of Defense, 77 M.S.P.R. 224, 230(1998); Fisher v. Department of Defense, 47 M.S.P.R. 585, 587-88 (1991).*

decision. The date on which the initial decision become final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit systems Protection Board
1615 M Street, NW
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of

filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

	Appellant
U.S. Mail	Harry M. Schmitt 7211 Captain Kidd Avenue Sarasota, FL 34231-4718
	Appellant Representative
U.S. Mail	Archibald J. Thomas, III Riverplace Tower 1301 Riverplace Blvd. Suite 1640 Jacksonville, FL 32207
	Agency Representative
U.S. Mail	Kevin J. Keefe, Esq. Department Of The Navy Strategic Systems Programs (SPLE) Office of Counsel Nebraska Avenue Complex 287 Somers Court, NW Suite 10041 Washington, DC 20393

December 30, 2005
(Date)

s/Renee Leech-Carlos by/Glea
Renee Leach-Carlos
Paralegal Specialist

Docket No. AT-1221-05-0958-W-1
Party: Appellant's Representative

Archibald J. Thomas, III
Riverplace Tower
1301 Riverplace Blvd.
Suite 1640
Jacksonville, FL 32207

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Your e-filing identification number is **5731756.**

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARRY M. SCHMITT, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER AT-1221-05-0958-W-1 DATE: June 13, 2006

Archibald J. Thomas, III, Jacksonville, Florida, for the appellant.

Kevin J. Keefe, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that established this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we find that a question exists regarding the timeliness of the appellant's petition for review of the initial decision issued on December 30, 2005. We have not decided that issue because we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review on the merits without addressing the timeliness of the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F. 2d 1544(Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http:fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and For 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

Docket No. AT-1221-05-0958-W-1
Party: Appellant

Harry M. Schmitt
7211 Captain Kidd Avenue
Sarasota, FL 34231-4718

CERTIFICATE OF SERVICE

I hereby certify that the attached Reply Brief was sent as indicated this day to each of the following:

Respondent

U.S. Express Certified Mail

TARA K. HOGAN,
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Attn: Classification Unit
Washington, DC 20530

Respondent

U.S. Merit Systems Protection Board

U. S. Express Certified Mail

Calvin Morrow
Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419-0002

U. S. Court of Appeals for the Federal Circuit

U. S. Express Certified Mail

Jan Horbaly
Clerk of court
717 Madison Place, N.W.
Washington, D.C. 20439

Intervenor

U. S. Express Certified Mail

Department of the Navy
Office of the General Counsel
720 Kennon Street SE
Washington, D.C.
20374-5012

Petitioner Representative

U. S. Express Certified Mail

Archibald J. Thomas, III
1301 Riverplace Blvd.
Riverplace Tower,
Suite 1640
Jacksonville, FL 32207

October 18, 2006
(Date)

Harry M. Schmitt
Harry M. Schmitt,
Petitioner

U. S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspd.gov

2006-3287

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit systems Protection Board in the appeal of Harry M. Schmitt v. Department of the Navy, MSPB Docket No. AT-1221-05-0958-W-1, and that the administrative record is under my official custody and control on this date_____

on file in this Board
July 24, 2006
Date

s/Marie Warcholah
Bentley M. Roberts, Jr.
for Clerk of the Board

INDEX

Harry M. Schmitt v. DEPARTMENT OF THE NAVY

Docket No. AT-1221-05-0958-W-1

Volume 1

TAB	DOCUMENT DESCRIPTION	DATE OF RECEIPT OR ISSUANCE
1	Initial Appeal to MSPB	September 16, 2005
2	Acknowledgement Order	September 22, 2005
3.	Agency Response File	October 13, 2005
4.	MSPB Order	November 23, 2005
5.	Appellant Submission	December 11, 2005
6.	Appellant Submission	December 20, 2005
7.	Appellant Submission	December 22, 2005
8.	Appellant Submission	December 22, 2005
9.	MSPB Order	December 30, 2005
10.	MSPB Initial Decision	December 30, 2005

HARRY M. SCHMITT
v.
DEPARTMENT OF THE NAVY

MSPB Docket No. AT-1221-05-0958-W-1

INDIVIDUAL RIGHT OF ACTION (IRA) -

PETITION FOR REVIEW

TAB	DESCRIPTION OF DOCUMENT	DATE OF RECEIPT OR ISSUANCE
1	Appellant - Petition for Review	February 08, 2006
2	MSPB - Petition For Review Acknowledgement Letter	February 09, 2006
3	Appellant - Additional Submissions with PFR	February 10, 2006
4	Other - Ack. Letter returned, Sent to new address - agency rep.	February 27, 2006
5	Agency - EOT Request to Respond to PFR	March 03, 2006
6	MSPB - Extension of Time Order	March 03, 2006
7	Appellant - Copy of letter about EEOC complaint process	March 08, 2006

8	MSPB - Settlement Memo to File	March 14, 2006
9	AGENCY REPRESENTATIVE Change of E-Filing Status	March 20, 2006
10	Appellant - Medical Submission	April 04, 2006
11	MSPB - Final Order	June 13, 2006
12	Appellant - Medical Information	July 07, 2006

CERTIFICATE OF SERVICE

I hereby certify that the attached Document(s) was (were) sent as indicated this dat to each of the following:

Petitioner

Electronic Mail — Harry M. Schmitt
7211 Captain Kidd Avenue
Sarasota, FL 34231-4718

Respondent

U. S. Mail — David Cohen, Director
Commercial Litigation Branch
Civil Division Classification Unit
U.S. Department of Justice
1100 L Street, N.W., Room 12124
Washington, DC 20530

July 24, 2006

s/Marie Wareholah
for Bentley M. Roberts, Jr.
Clerk of the Board

Docket No. AT-1221-05-0958-L-1
Party: Appellant

Harry M. Schmitt
7211 Captain Kidd Avenue
Sarasota, FL 34231-4718

UNITED STATES
APPEALS FOR THE FEDERAL CIRCUIT

2006-3287

HARRY M. SCHMITT,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ORDER

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

The petitioner having failed to pay the docketing fee required by Federal Circuit Rule 52(a)(1) within the time permitted by the rules, it is

ORDERED that the petition for review be, and the same hereby is, DISMISSED, for failure to prosecute in accordance with the rules.

FOR THE COURT,
"s/JanHorbaly"
Jan Horbaly
Clerk

07/24/06

cc: Clerk's Office, MSPB
Harry M. Schmitt
Tara K. Hogan

FILED
U.S. COURT OF
APPEALS FOR THE
FEDERAL CIRCUIT

ISSUED AS A MANDATE: 07/24/06

JUL 24 2006

SCHMITT V NAVY, 2006-3287
MSPB - AT1221050958-W-1

JAN HORBALY
CLERK

United States Court of Appeals for the Federal Circuit

Harry M Schmitt , Petitioner or Appellant,

v. **PETITION FOR REVIEW**

David M. Cohen , Respondent or Appellee.

Harry M. Schmitt (Name all parties* bringing the petition or appeal) hereby petition/appeal the court for review of the Public Order (describe the order or decision and include decision number) of the Clerk of the Court (Name the agency, board, or officer) entered on July 24, 2006 (date). The order or decision was received on July 28, 2006 (date).

Harry M. Schmitt

Harry M. Schmitt
7211 Captain Kidd Avenue
Sarasota, Florida 34231-4718
(941) 923-2253

7211 Captain Kidd Avenue
Sarasota, Florida 34231-4718

July 29, 2006

Date of Injury: 12/15/2000
DOL OWCP File No.: 062048358

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Attn: Ms. Jan Horbaly, Clerk of the Court of Appeals
Washington, DC 20439

Dear Ms. Jan Horbaly:

I am writing this letter to you in response to your letter to me dated July 24, 2006 concerning non-payment of my docketing/*filing fee. I have checked with my credit card company, and I have discovered the Four Hundred and Fifty Dollars ($450) has not been posted to my credit card Account Number 5424-18067855 2248 with Expiration Date of April 2007. I must assume that for some unknown reason the docketing /filing fee transaction did not go through to my credit card company. Therefore, I ask your and the Court's forgiveness, and I ask that you and the Court accept my personal check in the amount of Four Hundred and Fifty Dollars ($450) payable to you, the Clerk of the Court of Appeals. Thank you!
*Included $5.00filing fee payable to Clerk of Court.

Sincerely,
Harry M. Schmitt
Harry M. Schmitt

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-3287

HARRY M. SCHMITT,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

ORDER

Note: Pursuant to Fed. Cir.R.47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Petitioner having paid the initial filing fee, it is

ORDERED that the order of dismissal and the mandate be, and the same hereby are, VACATED and RECALLED, and the petition for review is REINSTATED.

FOR THE COURT,

08/11/2006

"s/Jan Horbaly"
Jan Horbaly
Clerk

cc: Clerk's Office, MSPB
Harry M. Schmitt
Tara K. Hogan

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SCHMITT V NAVY, 2006-3287
(MSPB - AT1221050958-W-1)

AUG 11 2006

JAN HORBALY
CLERK

RECEIPT FOR PAYMENT
United States Court of Appeals
For The Federal Circuit

Received From: Harry M. Schmitt
Sarasota, FL 34231

06-3287 (CASE NO.) Schmitt v. Navy (SHORT TITLE) 8/9/06 (DATE)

ACCOUNT	AMOUNT
Clerk's Fee for docketing case	455 00
Certificate of membership	
Certified copy of	
Copy of opinion	
Copy of documents	
Reimbursement fees	
Deputy Clerk ☐ Total	455 00

☐

Credit Card ☐ Cash ☐ Check ☐ MONEY ORDER ☐

046992 (2 CHECKS)

Note: Pursuant to Fed. Cir.R.47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

2006-3287

HARRY M. SCHMITT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF THE NAVY,

Intevenor.

ON MOTION

Before BRYSON, Circuit Judge.

ORDER

The Department of the Navy moves without opposition to reform the caption to designate the Merit Systems Protection Board as respondent and for leave to intervene.

Pursuant to 5 U.S.C. § 7703(A)(2), the Board is designated as the respondent when the Board's decision concerns solely the procedure or jurisdiction of the Board. The employing agency is designated as the respondent when the Board reaches the merits of the underlying case.

Schmitt filed an individual right of action (IRA) alleging that the agency "took an undetermined personnel action against him in reprisal for his protected whistleblowing activities." Schmitt failed to respond to the administrative judge's (AJ) order directing Schmitt to submit his allegations so that an initial jurisdictional determination could be made. Citing Yunus v. Department of Veterans Affairs, 242 F .3d 1367, 1371(Fed. Cir. 2001), the AJ found that the Board lacked jurisdiction over Schmitt's IRA appeal because, in failing to make any allegations whatsoever, Schmitt failed to carry his jurisdictional burden of making a non-frivolous allegation that he made a protected disclosure.

Because the AJ's ruling was a jurisdictional determination, the Board is the proper respondent pursuant to 5 U.S.C. § 7703(a)(2).

Accordingly,

IT IS ORDERED THAT:

(1) The motion to reform the caption is granted. The revised official caption is reflected above.

(2) The Board's and Navy's briefs are due within 21 days of the date of filing of this order.

9/20/06

"s/William C. Bryson"
William C. Bryson
Circuit Judge

cc: Harry M. Schmitt
Tara K. Hogan, Esq.
Calvin Morrow, Esq. (Enclosure: Copy of Schmitt's Informal Brief)

s16

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
SEP 21 2006

JAN HORBALY
CLERK

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF SUBMISSION WITHOUT ORAL ARGUMENT

2006-3287

SCHMITT V MSPB

A review of this case indicates that oral argument is not required and that the appeal may be decided on the briefs without prejudice to full consideration of the issues. This case will be submitted to a panel of judges of the court on 12/04/2006. Because the court has not allotted time for oral argument, nothing concerning this case will take place in open court even though the appeal appears on the court's calendar for the day.

Someone appearing pro se, or counsel for a party, may file a memorandum presenting reasons why oral argument would assist the court or answers to points in an opposing brief that might otherwise have been presented at oral argument, or both. The memorandum, not to exceed 5 pages, may be typewritten on 8 ½ by 11 inch paper. An original and six copies of the memorandum should be filed on or before November 15, 2006. If there are any questions regarding this notice, please contact James Benjamin (202) 312-5526, for MSPB, Court of Federal Claims, or Department of Veterans Affairs appeals, or Linda Purdie (202) 312-5527, for other appeals.

If a request for oral argument is made and granted, the appeal wold be scheduled for hearing on the same date that this case is to be submitted to the court, and you will be notified by telephone or mail.

After the appeal has been decided by the panel of judges, you will be sent a copy of the decision by mail. Although appeals are usually decided soon after the submission date, in some instances a longer period is required. In any event, you will be notified promptly.

FOR THE COURT

JAN HORBALY
CLERK

October 20, 2006

cc: Harry M. Schmitt
Tara K. Hogan, Calvin Morrow

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM

REQUEST FOR ORAL ARGUMENT

2006-3287

SCHMITT V MSPB

Dear Ms. Jan Horbaly, Clerk of the Court:

Oral argument will aid the court in understanding the reasons behind how the employing agency perpetrated its act of fraud and abuse of authority upon me, an innocent victim of sexual harassment in the employing agency's reprisal for whistle blowing, hostile threatening workplace environment.

Very Respectfully Submitted,

Harry M. Schmitt

Harry M. Schmitt, Petitioner

October 25, 2006

CC: Tara K. Hogan, Calvin Morrow

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

2006-3287

HARRY M. SCHMITT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

DEPARTMENT OF THE NAVY,

Intervenor.

ON MOTION

ORDER

Harry M. Schmitt requests oral argument in this appeal.

Upon consideration thereof,

IT IS ORDERED THAT:

The request is denied. The case will be submitted on the briefs without oral argument on December 4, 2006.

FOR THE COURT

Dated: November 6, 2006

s/"Jan Horbaly"
Jan Horbaly Clerk

cc: Harry M. Schmitt
Calvin Morrow
Tara K. Hogan

FILED
U.S. COURT OF APPEAL FOR
THE FEDERAL CIRCUIT

NOV 6 2006

JAN HORBALY
CLERK